

TURNER BROTHERS, INC.
v.
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 86-191

Decided June 22, 1988

Appeal from a decision of Administrative Law Judge Frederick A. Miller, affirming the issuance of violations 1, 2, and 3 of Notice of Violation No. 84-03-006-014. TU-5-17-R.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: State Program: Generally

Publication in the Federal Register constitutes adequate notice of revocation of state primacy for the purposes of sec. 521(b) of the Surface Mining Control and Reclamation Act, 30 U.S.C. § 1271(b) (1982).

2. Surface Mining Control and Reclamation Act of 1977: State Program: Generally

A person conducting surface coal mining operations in Oklahoma under a permit issued during the initial regulatory period may continue to conduct operations under that permit beyond the date required for obtaining a permit issued pursuant to the Oklahoma permanent regulatory program if, inter alia, the operations are conducted in compliance with the Department's initial program regulations. This exception is consistent with Citizens for the Preservation of Knox County, 81 IBLA 209 (1984), in which the Board ruled that when surface coal mining operations are completed prior to approval of a state program, the remaining reclamation operations may be completed under the initial program regulations.

3. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Burden of Proof -- Surface Mining Control and Reclamation Act of 1977: Hearings: Generally

OSMRE makes a prima facie case by submitting sufficient evidence to establish the essential facts of the

violation. When this evidence is un rebutted, the violation will be sustained on appeal.

4. Surface Mining Control and Reclamation Act of 1977: Hydrologic System Protection: Generally -- Surface Mining Control and Reclamation Act of 1977: Water Quality Standards and Effluent Limitations: Sedimentation Ponds

The sedimentation pond requirement is a preventive measure; thus, proof of the occurrence of the harm it is intended to prevent is not necessary to establish a violation. A violation may be established where there is evidence of a reasonable likelihood that there will be surface drainage from areas disturbed in the course of surface coal mining and reclamation operations, that it will not pass through a sedimentation pond or siltation structure, and that it will leave the permit area.

APPEARANCES: Mark Secrest, Esq., Muskogee, Oklahoma, for appellant; Marshall C. Stranburg, Esq., Office of the Regional Solicitor, Tulsa, Oklahoma; Stuart A. Sanderson, Esq., and Angela F. O'Connell, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Turner Brothers, Inc. (Turner Brothers), has appealed the decision of Administrative Law Judge Frederick A. Miller dated November 27, 1985, Docket No. TU-5-17-R. Judge Miller ruled that the Office of Surface Mining Reclamation and Enforcement (OSMRE) acted within its jurisdiction when it issued Notice of Violation (NOV) No. 84-03-006-014 to Turner Brothers at its Muskogee No. 2 mine; that Turner Brothers, which operated the Muskogee No. 2 mine under an initial program permit, was required to comply with the Department's initial program regulations, 30 CFR Chapter VII, Subchapter B; and that OSMRE presented an un rebutted prima facie case that violations 1, 2, and 3 of NOV No. 84-03-006-014 existed on the date of inspection.

Factual Background

Oklahoma's State program was conditionally approved by the Secretary of the Interior on January 19, 1981. 30 CFR 936.10 (46 FR 4910). However, on April 12, 1984, OSMRE published notice in the Federal Register of its decision to assume primary enforcement jurisdiction over Oklahoma's State program with an effective date of April 30, 1984. 30 CFR 936.17 (49 FR 14674).

On October 15, 1984, OSMRE Inspector Joe Funk inspected Turner Brothers' Muskogee No. 2 mine, operated under Oklahoma permit 80/81-3075, issued during the initial period (Tr. 8). Inspector Funk issued NOV No. 84-03-006-014 as a result of this inspection, citing Turner Brothers with four violations,

the first three of which are of concern in this appeal. ^{1/} Violation 1 was issued for failure to fill, grade, or otherwise stabilize rills and gullies on regraded and topsoiled areas (Tr. 10), as required by 30 CFR 715.14(i); violation 2 was issued for failure to adequately maintain sedimentation ponds (Tr. 20), as required by 30 CFR 715.17(f); and violation 3 was issued for failure to pass all water from the disturbed area through a sedimentation pond (Tr. 36), as required by 30 CFR 715.17(a).

On November 15, 1984, Turner Brothers filed an application for review of the NOV. A hearing was held in Tulsa, Oklahoma, on June 11, 1985, following which Judge Miller issued his November 27, 1985, decision. Turner Brothers filed a timely appeal to this Board challenging all three of Judge Miller's rulings, set forth supra. For the reasons explained below, we affirm Judge Miller's decision.

Discussion

[1] Turner Brothers' first argument is that OSMRE lacked jurisdiction to issue the NOV because when OSMRE assumed primary enforcement jurisdiction of surface coal mining operations in Oklahoma, it did not allow for proper notice under the Administrative Procedure Act, 5 U.S.C. § 553(d) (1982). This argument has been considered and rejected on numerous occasions by this Board. E.g., Turner Brothers, Inc. v. OSMRE, 100 IBLA 365 (1988); Turner Brothers, Inc. v. OSMRE, 99 IBLA 349 (1987); Turner Brothers, Inc. v. OSMRE, 93 IBLA 194 (1986).

As in the previous Turner Brothers cases, we affirm Judge Miller's dismissal of Turner Brothers' challenge to OSMRE's jurisdiction.

[2] Inspector Funk cited Turner Brothers with violations 1, 2, and 3 of NOV 84-03-006-014 for failure to comply with several of the Department's initial program regulations. However, Turner Brothers argues that those regulations "were never adopted by the Oklahoma Legislature and therefore, were never in effect in Oklahoma at the time of the issuance of NOV 84-03-006-014 (1 of 4, 2 of 4, 3 of 4)" (SOR at 5). Thus, according to Turner Brothers, its operations at the Muskogee No. 2 mine were not subject to the Department's initial program regulations and it was improperly issued the NOV.

Section 22 of the Oklahoma Coal Mining Reclamation Act of 1978, 45 Okla. Stat. § 762, required the Governor of Oklahoma to promulgate rules and regulations to implement Oklahoma's surface mining legislation if the Oklahoma Department of Mines (ODOM) had not adopted such rules and regulations by April 3, 1978. ODOM failed to adopt rules and regulations by that date, so Governor David L. Boren signed Executive Order 78-24 on July 11, 1978, adopting 30 CFR Parts 700 through 830 as Oklahoma's initial program regulations. Turner Brothers asserts that Governor Boren's action violated the Oklahoma Administrative Procedure Act, 75 Okla. Stat. §§ 301-308. Judge

^{1/} During the hearing OSMRE moved that violation 4 be vacated. Judge Miller so ordered in his decision.

Miller rejected Turner Brothers' argument, agreeing instead with OSMRE's contention that Governor Boren's action substantially complied with Oklahoma law.

OSMRE argued, further, and Judge Miller agreed, that Turner Brothers' challenge to Governor Boren's adoption of initial program regulations was being raised in the wrong forum in an untimely manner. OSMRE explains that 75 Okla. Stat. § 303 requires that any proceeding to contest any rule on grounds of procedural noncompliance must be commenced within 2 years from the effective date of the rule. In Associated Builders & Contractors of Oklahoma v. Oklahoma Department of Labor, 628 P.2d 1156 (Okla. 1981), the court outlined two methods under Oklahoma law for challenging rules allegedly adopted contrary to law: one method is to commence an action for declaratory judgment in the appropriate State court pursuant to 75 Okla. Stat. § 306, and the second method is to request the repeal or amendment of the challenged rules pursuant to 75 Okla. Stat. § 305, subject to judicial review by a State court in accordance with 75 Okla. Stat. § 318. We agree with Judge Miller that if Turner Brothers desired to challenge Governor Boren's adoption of the Department's initial program regulations, it had to proceed in accordance with the procedures embodied in Oklahoma law.

More pertinently, we agree with Judge Miller that "[e]ven if it were found that the State of Oklahoma did not adopt interim program rules and regulations in 1978, despite Governor Boren's Order, Oklahoma's permanent program allows a permittee to continue to operate on a permit issued by ODOM in accordance with section 502 of [SMCRA]" (Decision at 4). Judge Miller found that "[a] permittee was allowed to continue to conduct surface coal mining operations under an interim program permit beyond the date for obtaining a permanent program permit under OPRPR [Oklahoma Permanent Regulatory Program Regulation] 771.11 as long as the conditions of OPRPR 771.13 were met." Id. One of those conditions is that the permittee conduct the operations in compliance with the Department's "initial regulatory program." 2/

A person conducting surface mining and reclamation operations in Oklahoma is subject to the Department's initial regulations in circumstances which are clearly defined under SMCRA and the regulations, as well as under Oklahoma's permanent program. This principle is established by reviewing the relevant statutory regulatory provisions.

Section 502 of SMCRA, 30 U.S.C. § 1252 (1982), which outlines the initial program procedures, provides at subsection (a): "No person shall open or develop any new or previously mined or abandoned site for surface coal mining operations on lands on which such operations are regulated by a State unless such person has obtained a permit from the State's regulatory

2/ The regulation imposing that condition states that operations are to be "conducted in compliance with all terms and conditions of the interim permit, the requirements of the Federal Act, Parts 710, 715, 716, and 717 of the initial regulatory program, and the State statutes and regulations." OPRPR 771.13(c).

authority." The Department's initial program regulations establish timetables for compliance with section 502:

Performance standards obligations. (i) A person who conducts any coal mining operations under an initial permit issued by a State on or after February 3, 1978, shall comply with the requirements of the initial regulatory program. Such permits shall contain terms that comply with the relevant performance standards of the initial regulatory program.

(ii) On and after May 3, 1978, any person conducting coal mining operations shall comply with the initial regulatory program, except as provided in § 710.12 of this part.

(iii) A person shall comply with the obligations of this section until he has received a permit to operate under a permanent State or Federal regulatory program. [Emphasis added.]

30 CFR 710.11(a)(3).

Upon the Secretary's approval of Oklahoma's State program, Turner Brothers was required to submit an application for a permit to operate under that program in accordance with sections 502(d), 30 U.S.C. § 1252(d) (1982), and 506(a), 30 U.S.C. § 1256(a) (1982), of SMCRA. Section 502(d) provides that "not later than two months following the approval of a State program * * * all operators of surface coal mines in expectation of operating such mines after the expiration of eight months from the approval of a State program * * * shall file an application for a permit with the regulatory authority." Section 506(a) is to the same effect.

Therefore, a person conducting surface coal mining operations under authority of a permit issued by the state during the initial regulatory period, i.e., before approval of the state's regulatory program, must comply with the Department's initial program regulations. This requirement is independent of whether the state has adopted those regulations. Once the state has an approved permanent program, an operator must submit an application for a permanent program permit. There are two exceptions to this general rule, however. The first exception is embodied in subsection (b) of 30 CFR 771.13 (1979), which is set forth below:

A person conducting surface coal mining operations, under a permit issued or amended by the regulatory authority in accordance with the requirements of section 502 of the Act, may conduct these operations beyond the period prescribed in § 771.11, if:

(1) Timely and complete application for a permit under the permanent regulatory program has been made to the regulatory authority in accordance with the provisions of the Act, this subchapter, and the regulatory program;

(2) The regulatory authority has not yet rendered an initial decision with respect to such application; and

(3) The operations are conducted in compliance with all terms and conditions of the interim permit, the requirements of the Act, Subchapter B of this Chapter, and the State statutes and regulations.

Oklahoma's permanent program includes this exception in terms which are identical in all material respects, at OPRPR § 771.13. Clearly, a person who continues to conduct surface coal mining operations beyond 8 months after approval of the State's permanent regulatory program is required to comply with the Department's initial program regulations.

Turner Brothers argues that application of the Department's initial program regulations reflects OSMRE's "attempt to 'bootstrap,' or incorporate the interim rules and regulations into the Oklahoma Permanent Regulatory Program Regulations (OPRPR)" (SOR at 11). Turner Brothers bases this argument upon OPRPR § 701.11, which provides:

Any operator who conducts surface coal mining and reclamation operations on non-Indian or non-Federal lands on or after eight months from the date of approval of the Oklahoma program or implementation of a Federal program shall have a permit issued pursuant to the applicable State or Federal program. However, under conditions specified in § 771.13(b), a person may continue operations under a previously issued permit after eight months from the date of approval of a state program or implementation of a federal program. [Emphasis added.]

Turner Brothers interprets this provision to mean that an operator may continue operations under an interim permit under OPRPR 701.11(a) by complying only with OPRPR 771.13(b). OSMRE responds that "[t]his argument should be dismissed as frivolous" (Answer at 8).

OSMRE explains that when Oklahoma adopted OSMRE's regulations, including 30 CFR 711.11 and 771.13, it deleted certain provisions which were deemed irrelevant to surface mining operations in Oklahoma. We find this to be the case. Subsection (a) of 30 CFR 771.13 relates to surface mining operations in a state which has received final disapproval of its state program. Obviously, Oklahoma had no need for adoption of this subsection. When Oklahoma adopted the language of 30 CFR 771.13, it deleted subsection (a), and renumbered subsections (b)(1), (2), and (3), as (a), (b), and (c). We are persuaded by OSMRE's argument that "[t]his renumbering, however, was not reflected in OPRPR 701.11 when it was adopted from 30 C.F.R. 771.11" (Answer at 9).

The second exception to the general rule that a person must obtain a permanent program permit within 8 months after the Department's approval of the state's permanent program is embodied in Citizens for the Preservation of Knox County, 81 IBLA 209 (1981). In that case, the Board ruled that

"where * * * there [is] a permanent cessation of operations * * * prior to the approval of the State permanent program permit, the remaining reclamation operations may be completed under the interim regulations." 81 IBLA at 218. The case file does not disclose whether or when Turner Brothers submitted an application for a permit under Oklahoma's permanent program, or whether Turner Brothers completed its surface mining operations prior to approval of Oklahoma's permanent program, so that all that remained to be accomplished was reclamation of the permit area. Answers to these questions are not, however, essential to a disposition of this appeal. If all surface mining operations had not been completed by the end of the 8-month period following approval of Oklahoma's permanent program, OPRPR 771.13(b) required Turner Brothers to comply with the initial program permit. If all such operations had been completed, Citizens for the Preservation of Knox County allows the operator to conduct reclamation activities in compliance with the initial program regulations.

We infer from the discussion in Turner Brothers' SOR and in OSMRE's answer that at the time OSMRE issued the NOV in question Turner Brothers had ceased its mining activities and that its operations were in the reclamation stage (SOR at 12; Answer at 7-8). Turner Brothers cites Citizens for the Preservation of Knox County, *supra*, for the proposition that "[w]hen coal removal activities are governed by interim program rules and regulations, reclamation activities are also governed by interim program rules and regulations" (SOR at 12). Turner Brothers maintains, then, that the principle enunciated in Citizens for the Preservation of Knox County "prohibits the enforcement of permanent rules on an interim permit" (SOR at 12). This argument is disingenuous. While OPRPR 771.13 is a permanent program regulation, it specifically states what requirements an operator must follow in conducting operations under an initial permit beyond the 8-month deadline for obtaining a permanent program permit. We rule that Turner Brothers' operations at the Muskogee Mine at the time OSMRE issued the NOV in question were subject to the Department's initial program regulations.

[3] Turner Brothers argues that Judge Miller committed error in upholding violations 1, 2, and 3 of the NOV on the basis that OSMRE failed to present the elements necessary to establish a prima facie case that each of the violations occurred. The standard for evaluating Turner Brothers' argument that OSMRE failed to meet its burden of establishing a prima facie case was reiterated in S & M Coal Co., 79 IBLA 350, 354, 91 I.D. 159 (1984):

A prima facie case is made where sufficient evidence is presented to establish the essential facts. *E.g., Rhonda Coal Co.*, 4 IBSMA 124, 89 I.D. 460 (1982). Prima facie evidence is that evidence that will justify a finding in favor of the one presenting the evidence. *Id.* It is not necessary to present evidence that is compelling, and the determination as to whether a prima facie case has been made must be made on a case-by-case basis. An important factor in making a determination regarding the amount of evidence required for a prima facie case is the availability of the evidence. *Id.*

See 43 CFR 4.1171 (OSMRE has the burden of establishing a prima facie case, but the ultimate burden of persuasion rests with the applicant for review). We will apply this standard in reviewing the evidence.

Violation 1 of the NOV was issued for failure to fill, grade, or otherwise stabilize rills and gullies on regraded and topsoiled areas, as required by 30 CFR 715.14(i), which reads as follows: "When rills or gullies deeper than 9 inches form in areas that have been regraded and the topsoil replaced but vegetation has not yet been established the permittee shall fill, grade or otherwise stabilize the rills and gullies and reseed or replant the areas according to § 715.20 * * *." Judge Miller ruled that OSMRE established an un rebutted prima facie case that Turner Brothers violated this regulation. We agree with Judge Miller's summary and assessment of the evidence presented by the respective parties:

Through the testimony of Inspector Funk and Exhibits G-2, G-3 and G-4, OSM has presented a prima facie case as to the fact of Violation No. 1. Inspector Funk found three areas on the permit where rills and gullies had developed. The first area, shown in Exhibit G-2, had a gully deeper than nine inches formed in an area that Inspector Funk believed to be a disturbed permit area (Tr. 12). Exhibit G-3 shows the second area where Inspector Funk found rills and gullies deeper than nine inches that had formed on the disturbed permit area that had been retopsoiled (Tr. 14-15). The third area is depicted in Exhibit G-4, which shows an area where a gully of approximately nine inches in depth has formed, along with other gullies, on a retopsoiled area (Tr. 16-17). OSM has shown through the testimony and exhibits that a violation of 30 C.F.R. § 715.14(i) had occurred.

TBI [Turner Brothers, Inc.] has failed to carry its burden of proof in regard to this violation. TBI submitted no proof at the hearing that showed that the rills and gullies shown in Exhibits G-2, G-3 and G-4 were less than nine inches in depth. [3/] Nor did TBI show that these rills and gullies were not on the disturbed permit area. Inspector Funk merely conceded on cross-examination that it was possible that the mining line ran right next to the gully shown in Exhibit G-2. But this mere concession that it was possible that the area shown in Exhibit G-2 was not disturbed does not overcome the prima facie case presented by OSM. Prior mulching and seeding of the areas shown in Exhibits G-3 and G-4 does not relieve TBI from liability as clearly a violation has been shown to have been existing on the date of the

3/ The regulation, 30 CFR 715.14(i), addresses rills and gullies "deeper than 9 inches." However, it also allows the regulatory authority to require the stabilization of rills and gullies of lesser depth if they may result in additional erosion and sedimentation. Turner Brothers presented no evidence to rebut OSMRE's prima facie case.

inspection. Therefore, OSM has presented an un rebutted prima facie case and Violation No. 1 is affirmed.

(Decision at 5-6).

During his inspection of the Muskogee No. 2 mine, Inspector Funk found that the principal spillway outlet of pond 03 was severely eroded (Tr. 31; Exh. G-8). Accordingly, he cited Turner Brothers in violation 2 of the NOV for noncompliance with 30 CFR 715.17(f) which provides: "Discharges from sedimentation ponds and diversions shall be controlled, where necessary, using energy dissipators, surge ponds, and other devices to reduce erosion and prevent deepening or enlargement of stream channels to minimize disturbances to the hydrologic balance." Judge Miller ruled that Exhibit G-8, a photograph of the principal spillway outlet of pond 03, established that Turner Brothers violated the requirements of 30 CFR 715.17(f), and that Turner Brothers failed to rebut OSMRE's prima facie case. Judge Miller's discussion of this violation demonstrates that he ruled correctly:

Exhibit G-8 clearly shows the erosion that has occurred around the principal spillway outlet of pond 03. The exhibit also shows the absence of any type of energy dissipator that could control discharges from pond 03 and protect against erosion (Tr. 31). This is a violation of 30 C.F.R. § 715.17(f). There is no question that erosion has occurred and would continue to occur until the installation of energy dissipating devices or technology at the area shown in Exhibit G-8. TBI presented no evidence to rebut the erosional conditions that were shown by OSM, nor did TBI show any reason for not using an energy dissipator at this outlet to protect against erosion. Therefore, it is unquestionable that OSM properly issued Violation No. 2 to TBI for the erosion that occurred at the pond 03 outlet so that harm to the hydrologic balance does not occur.

TBI argues that it has no right or authority to go outside the permitted area and since the spillway is located at or near the permit boundary, then the harm occurred in an area beyond its control. Such an argument cannot and will not be accepted. 30 C.F.R. § 715.17(f) imposes an affirmative duty on the operator to control discharges from sedimentation ponds. Harm occurring off the permit area is one of the problems which the regulations seek to prevent. Therefore, the fact that the harm occurred off the permit area cannot be used as a defense.

(Decision at 6).

[4] During the inspection on October 15, 1984, Inspector Funk cited Turner Brothers with violation 3 of the NOV for its failure to comply with 30 CFR 715.17(a) for three separate areas of the permit. That regulation requires: "All surface drainage from the disturbed area, including disturbed areas that have been graded, seeded, or planted, shall be passed through a

sedimentation pond or a series of sedimentation ponds before leaving the permit area."

The Board in Turner Brothers, Inc. v. OSMRE, 102 IBLA 299, 306, 95 I.D. ____ (1988), recently clarified the type of proof that is necessary to establish a violation of surface drainage control regulations, including 30 CFR 715.17(a). We stated that in order to establish a violation there must be evidence of a reasonable likelihood that there will be surface drainage from areas disturbed in the course of mining and reclamation operations, that it will not pass through a sedimentation pond or siltation structure, and that it will leave the permit area. Thus, proof of the past or present existence of surface drainage is not mandatory, nor must OSMRE show that surface drainage has left the permit area. Evidence sufficient to establish that there is a reasonable likelihood that such events will occur in the future will support the finding of a violation. ^{4/}

Judge Miller summarized the evidence regarding the first area as follows:

One area is shown in Exhibit G-9. The photograph shows an area on the north permit boundary where a drainage channel had filled with sediment so that water was no longer being contained within the channel (Tr. 37-8). Sediment also had topped and gone over the berm that was designed to prevent water from leaving the disturbed permit area (Tr. 38). Inspector Funk also found gullies that had developed on the outslope of the berm and this indicated to him that water had crossed the berm (Tr. 38-9). The permit line was only a short distance below the berm (Tr. 39). While Inspector Funk did not see any water leave the permit area on that day and did not find any sediment off the permit (Tr. 39), based upon what he saw and upon his experience as an inspector, Inspector Funk believed that the potential existed for water and sediment to leave the permit area without passing through a sedimentation pond (Tr. 39-40).

(Decision at 7). Turner Brothers argues that "Inspector Funk admitted that he did not see any water leaving the permit in the area where G-9 was taken

^{4/} In Turner Brothers, Inc. v. OSMRE, 102 IBLA 299, 95 I.D. ____ (1988), we modified Alpine Construction Co. v. OSMRE, 101 IBLA 128, 95 I.D. 16 (1988), to indicate that evidence of past or present surface drainage from areas disturbed by surface coal mining and reclamation operations was not necessary to support a violation. In Alpine we had focused on the requirement that there be evidence that surface drainage from the disturbed area had left the permit area without passing through a sedimentation pond. We concluded, based on the preventative nature of the requirement, that proof that surface drainage has left the permit area is not mandatory to support a violation, but that evidence that surface drainage will leave the permit area will suffice. Thus, our Alpine rationale dictated that in Turner Brothers we modify the requirement that there be the existence of surface drainage. Evidence of a reasonable likelihood that there will be surface drainage is sufficient.

and that while some sediment had left the disturbed area, he could not determine if any sediment had actually left the permit" (SOR at 19).

In this case, the evidence is sufficient to establish that surface drainage breached the berm and that given the topography depicted on Exhibit G-9, surface drainage left the permit area or that there was a reasonable likelihood that it would leave the permit area. Under our holding in Turner Brothers, Inc. v. OSMRE, 102 IBLA at 306, 95 I.D. at __, such evidence supports the finding of a sedimentation pond violation. We conclude that Judge Miller ruled correctly that OSMRE established an un rebutted prima facie case as to this first area.

Turner Brothers offers essentially the same arguments with regard to the second area cited by OSMRE in violation 3 of the NOV, shown in Exhibit G-10. Our review of the transcript and the briefs submitted by the parties demonstrates the accuracy of Judge Miller's summary of the evidence presented in connection with this area. His analysis is set forth below:

The second area cited by Inspector Funk is shown in Exhibit G-10. This area is found at the west permit boundary, with the fenceline being the actual permit boundary (Tr. 40). The exhibit shows a gully that has eroded across the permit boundary and passes into adjacent land that is off the permit (Tr. 42). This photograph also shows sediment that has washed off the disturbed permit area into the area shown in Exhibit G-10 and across the fenceline through the gully (Tr. 42). Inspector Funk found evidence of sediment across the fenceline in the off-permit area (Tr. 42). Based upon his experience as an inspector and upon what he perceived, Inspector Funk knew that water had left the permit area without passing through a sedimentation pond (Tr. 42-3).

(Decision at 7).

The third area which Inspector Funk determined to be in violation of 30 CFR 715.17(a) is depicted in a photograph marked Exhibit G-11. Inspector Funk's testimony established that drainage leaves the permit area and is accumulated in a "sump" off the permit area (Tr. 46-47). When enough drainage is accumulated in the sump, it is discharged and flows into a channel back onto the permit area, where it passes into a sedimentation pond (Tr. 47). Sediment and materials left in the sump do not flow back onto the permit area (Tr. 50-51).

Again, Judge Miller ruled that the testimony concerning the area shown in Exhibit G-11 established all the necessary elements of a violation of 30 CFR 715.17(a). Turner Brothers argues "that the disturbed area was only a couple of acres," and that "the environmental harm that would be caused by this scenario was negligible" (SOR at 21). Turner Brothers supports this argument with reference to an Oklahoma hearing examiner's decision which involved similar facts; the hearing examiner dismissed the NOV, stating that "the spirit of the act, if not the letter of the law, was being satisfied." Judge Miller responded that he was "concerned with not only the spirit

of the law but with the letter of the law as well." He concluded: "The fact that drainage leaving the area before passing through a sedimentation pond finds its way back to a sedimentation pond through some fortuitous event does not satisfy the regulation" (Decision at 8).

The elements set forth by the Board in Turner Brothers, Inc. v. OSMRE, 102 IBLA at 306, 95 I.D. at ___, exist for this third area also. Thus, we affirm Judge Miller's ruling regarding the finding of a violation for the area depicted in Exhibit G-11. The fact that the disturbed area may have been small and environmental harm may have been negligible do not mitigate the fact of violation, but they may be taken into consideration in determining the amount of civil penalty to be assessed for the violation. See 30 CFR 723.13.

In summary, we affirm Judge Miller's rulings that OSMRE had jurisdiction to issue violations 1, 2, and 3 of the NOV, that Turner Brothers' operations at the Muskogee No. 2 mine were subject to the Department's initial program regulations, and that OSMRE established an unrebutted prima facie case that each of those violations existed on the date of the inspection.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Bruce R. Harris
Administrative Judge

I concur:

Gail M. Frazier
Administrative Judge

ADMINISTRATIVE JUDGE ARNESS CONCURRING SPECIALLY:

While I agree generally with the majority disposition of the principal issues on appeal, I harbor reservations about the disposition given to violation 3 of the notice of violation under review relating to the requirement that surface drainage from mined areas be passed through a sedimentation pond. The lead opinion's review of the first area said to be in violation of 30 CFR 715.17(a), for failure to pass surface drainage through a pond, is applied to a situation where the inspector did not see any surface drainage and was unable to testify that surface drainage had left the permit area. Despite this circumstance, we find that there was nonetheless a violation of the regulation as charged because "[e]vidence that there will be surface drainage is sufficient." Footnote 4, supra. This holding, which is a considerable departure from past decisionmaking in this subject area, follows from our recent decisions in Alpine Construction Co. v. OSMRE, 101 IBLA 128, 95 I.D. 16 (1988), and Turner Brothers, Inc. v. OSMRE, 102 IBLA 299, 95 I.D. ___ (1988). Because the majority of this Board has now recorded approval of this new approach to the surface drainage issue I feel compelled to accept the majority position out of respect for the now established precedent, which rejects the standard of proof required to establish a surface drainage violation of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. §§ 1201-1328 (1982), as established in 1982 by the Interior Board of Surface Mining and Reclamation Appeals (IBSMA).

In Avanti Mining Co., Inc., 4 IBSMA 101, 89 I.D. 378 (1982), IBSMA, following its prior decisions, defined the factual elements of a prima facie case for proving failure to pass surface drainage through a sedimentation pond. As restated in Consolidation Coal Co., 4 IBSMA 227, 237, 89 I.D. 632, 637 (1982), these elements became the standard applied in a number of hearings and appeals: "(1) The existence of surface drainage from areas disturbed in the course of mining and reclamation operations; (2) that such drainage was not passed through a sedimentation pond; and (3) that the drainage left the permit area." As applied by IBSMA, these elements could be established not only by evidence of drainage seen on the day of inspection, but also by credible evidence of past drainage from the disturbed area showing it had flowed off the permit area. Id. at 242-43, 89 I.D. at 640. Thus, in Consolidation Coal, a photograph of a breach in a berm showing erosion and containing standing water, combined with the inspector's testimony about conditions at the site and the topography of the area was sufficient to establish a prima facie case. Id. at 238, 89 I.D. at 638.

Our decision in Alpine focused on the third element, which required OSMRE to prove that surface drainage had left the permit area, and we overruled Avanti and Consolidation Coal along with Turner Brothers, Inc. v. OSMRE, 98 IBLA 395 (1987). Alpine Construction Co. v. OSMRE, 101 IBLA at 137-38, 95 I.D. at ___. In Alpine we stated:

We do not think a showing that surface drainage actually left the permit area is necessary to establish a violation of 30 CFR 715.17(a). The proper emphasis must be placed upon whether, given

the topography, a sedimentation pond is necessary to prevent surface drainage from leaving the permit area. When the evidence established that there are no sedimentation ponds, and that surface drainage has left or will leave the permit area, a violation of 30 CFR 715.17(a) is established.

Id. at 139, 95 I.D. at __.

In Turner Brothers, Inc. v. OSMRE, 102 IBLA 299, 95 I.D. __ (1988), we went one step further, and eliminated altogether the first element established by the Avanti and Consolidation Coal decisions -- the requirement that there be proof of the existence of surface drainage. Thus we arrive at our present holding, which requires none of the elements of the Avanti and Consolidation Coal cases, but only the "reasonable likelihood" that surface drainage may occur. It is now clear, therefore, that the three-part test established by Avanti and Consolidation Coal has been abandoned entirely, and that those cases are overruled in their entirety by our recent decisionmaking in this area. Our reason for doing so has been stated to be prophylactic in nature -- the previous test required a showing that damage had occurred and it was felt that the occurrence of damage should not be tolerated, given the bias of SMCRA towards prevention of environmental harm.

Our Alpine decision, and the Turner Brothers, Inc. decision which follows Alpine, both indicate that the violation OSMRE is trying to reach when it cites operators under the regulations governing surface drainage is actually the failure to construct a sedimentation pond or diversion structure. If this is so, it would be a preferable practice that OSMRE should cite the operator for the actual violation observed, rather than alleging a surface drainage violation has occurred. SMCRA requires construction of siltation structures prior to mining (30 U.S.C. § 1265(b)(10)(B)(ii) (1982)), as do the regulations (30 CFR 816.46(b)(3)). An operator could also be cited for failure to conduct mining operations in compliance with the approved permit application or failure to meet a condition of the permit (30 CFR 773.17, 843.12(a)), as well as failure to conduct surface mining operations in accord with the hydrologic plan submitted with the application (30 CFR 780.21, 816.41(d)). It seems to me, therefore, that it was unnecessary to overrule the IBSMA decisions in Avanti and Consolidation, and the 1987 Turner Brothers, Inc. decision which followed the IBSMA decisions, because there are adequate means, aside from the surface drainage regulations, by which to insure against pollution from runoff. If the absence of a siltation pond is the defect perceived, it should be so charged.

Departmental regulation 30 CFR 816.41(d)(2) provides that "[a]ll surface drainage from the disturbed area shall be passed through a siltation structure before leaving the permit area * * *." What the Board has done in Alpine and the most recent Turner Brothers, Inc. decision is to broaden the application of this regulation to encompass situations previously dealt with by our cases concerning surface drainage violations. I think this action was not required, since other adequate safeguards against such violations existed. But since it is clear that a majority of the Board has already approved this practice, I reluctantly agree that as a consequence the stance taken by the lead opinion now reflects the position of the majority of the

Board, and that the surface drainage violations cited against appellant were properly upheld under our revised standard for adjudicating these cases.

Franklin D. Arness
Administrative Judge